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FOR THE NINTH CIRCUIT

R. C. BELL and MARY A. BELL,
Appellants-Defendants,

vs.

MARY E. C. MORLEY and FRED MORLEY,
Respondents-Plaintiffs.

APPELLANTS' BRIEF

KOLLOCK, ZOLLINGER & MCDOWALL,
Attorneys and Solicitors for Appellants.

PLATT & PLATT, AND HUGH MONTGOMERY,
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STATEMENT OF FACTS.

In October, 1911, Mary E. C. Morley and Fred Morley claimed to be the owners of Lots 2, 3 and 4 and the southeast quarter of northwest quarter, and the east half of southwest quarter, and southeast quarter of Section 19; the west half of southwest quarter of Section 20; the northwest quarter of northwest quarter of Section 29, all in Township 10 North, Range 7 West, of Willamette Meridian, situate in Wahkiakum County, State of Washington.

Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of Section 24, in Township 10 North, Range

8 West of W. M., together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906, and together with the right to build, operate and maintain railroads, skid-roads, telephone lines, or other devices, over and across said described land and necessary or convenient to remove said timber therefrom.

Also that certain right of way conveyed to G. K. Durrah and Clara Durrah, his wife, under date of January 15, 1912, for fifteen years, in language following, to-wit:

> A right of way 12 feet wide, over our land for a railroad, commencing about 500 feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing. We also grant a privilege of using the river bank as a roll way.

Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date January 15, 1913, for ten years, in language following, to-wit:

> A right of way for a railroad over our land, situated near Grays River, Washington. Width of right of way over said ground 15 feet. Work

> shall begin within 60 days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a roadbed through the hay field.

Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date January 16, 1912, for ten years, in language following, to-wit:

> A right of way for a logging railroad over the following described land: Southwest quarter of northeast quarter of Section 19, Township 10, Range 7. Work to start within 60 days from date. Logging road to follow left hand side along foothill.

Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, to have and to hold unto the parties of the second part, their heirs and assigns forever.

That on said property was considerable standing and lying timber of merchantable character; that defendant and appellant, R. C. Bell, is engaged in the logging business in the State of Washington, and as such his attention was attracted to the property above described by James D. Lacey & Company, well-known timber cruisers and estimators of Portland, Multnomah County, Oregon, acting as factors and brokers and as agents of Mary E. C. Morley and Fred Morley, the reputed owners of the property.

R. C. Bell, as shown by the uncontradicted testimony, was desirous of procuring this property for the purpose only of taking off the timber. Correspondence passed between James D. Lacey & Company and R. C. Bell, relative to the property above described, which finally terminated in H. D. Langille, as agent of James D. Lacey & Company, and R. C. Bell being brought together for the purpose of ascertaining the amount of timber on the premises. On or about April 22, 1912, the transaction was finally closed by R. C. Bell purchasing the timber from Mary E. C. Morley and Fred Morley through James D. Lacey & Company, for the sum of $30,000.00, the purchase price of which was soon after paid with the exception of one note, executed April 22, 1912, signed by R. C. Bell, in the sum of $5625.00, payable to Mary E. C. Morley and Fred Morley, twelve months after date, which note was secured by purchase money mortgage on the property above described. When the note became due, payment was demanded and R. C. Bell refused to make payment on the ground that the amount of timber on the premises had been misrepresented to him and had fallen far short of the represented cruise. The plaintiffs filed suit to foreclose the mortgage in the District Court of the United States for the Western District of Washington, Southern Division, and immediately after applied to the court for a restraining order restraining the defendants above named and each of them and their agents, servants, employes and representatives from selling, conveying, encumbering or removing

from the County of Wahkiakum, State of Washington, one and one-half million feet of sawlogs, which respondent claimed defendant, R. C. Bell, had removed from the lands above described contrary to the provisions of the mortgage; and on July 7, 1913, in the District Court of the United States for the Western District of Washington, Southern Division, made and entered an order requiring defendants and each of them to show cause why an injunction should not be issued enjoining the above defendants and each of them, their agents, servants, employes and representatives from selling, conveying and encumbering or removing from the County of Wahkiakum, State of Washington, the said one and one-half million feet of sawlogs.

That thereafter, the complainants and defendants, acting through their respective solicitors of record, entered into a stipulation in writing, wherein and whereby it was provided that defendants might file in the above entitled court bond in the sum of $7500.00 given by R. C. Bell, defendant, as principal, and American Surety Company of New York, a corporation, as surety, conditioned that in consideration of the release of the said sawlogs from the said temporary restraining order theretofore issued, the said logs should be released and which logs afterwards were released; that thereafter the defendants filed an answer in said cause and reply having been filed by the complainants the case went to trial June 15, 1914, before

the District Court of the United States in and for the Western District of Washington before Hon. E. E. Cushman, judge of said court. After the case had been heard, the court made and entered a decree for the complainants and against the appellants.

The contention of the defendant in the lower court, the appellant herein, was that certain statements made by James D. Lacey & Company, as agent of Mary E. C. Morley and Fred Morley, were false and fraudulent as to the amount of timber on the premises, and were made with the intention to deceive the appellants herein, and that the deed executed by Mary E. C. Morley to the appellant herein conveyed no title in that no title was vested in Mary E. C. Morley and Fred Morley after the date of such conveyance to the appellant.

The Lower court found that at no time during the transaction involved in the above entitled suit and at no time prior to consummation of the sale and transfer of the lands involved in the above suit, or any portion thereof, from the complainants to the defendants, did the complainants or any person or persons acting for them or in their behalf, make any false representations as to the amount of timber on the lands involved in this title or any portion thereof, or make any fraudulent representation of any character as to said lands or the amount of timber thereon; also the lower court further found, that at the time of execution and delivery of deed

of conveyance from complainants to defendants, and contemporaneously therewith a certain indemnity agreement was entered into between Harrison G. Platt and Robert Treat Platt and the appellant herein, indemnifying him against any damage which said R. C. Bell might incur or suffer by reason of his cutting or removing said timber, due to the fact that the title in said premises did not vest in Mary E. C. Morley and Fred Morley, and from that decision this appeal has been perfected.

POINTS AND AUTHORITIES.

I.

Fraud.

1. In General: Fraud as a generic term, especially as the word is used in courts of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly imposed, and are injurious to another or by which an undue or unconscientious advantage is taken of another.

1 Storey, Equity, Sec. 187.
Conyers vs. Graham, 81 Ga. 615.
Crislip vs. Cain, 19 W. Va. 438.

2. Statement of Opinion: An expression of opinion may be so blended with statements of fact as to become itself a statement of fact.

20 Cyc. 18, 19.
Scholfield, Gear, etc. & Co. vs. Scholfield, 71 Conn 1; 40 Atl. 1046.
Marshall vs. Seelig, 49 N. Y. App. Div. 433; 63 N. Y. Sup. 355.
Gordon vs. Taylor, 105 U. S. 553.
Kilpatrick vs. Reeves, 121 Ind. 280.
Haight vs. Hoyt, 19 N. Y. 464.
Howard vs. Gould, 28 Vt. 728.

3. It is not always necessary that the speaker should actually know that his representation is false, and a reckless statement may amount to a fraudulent statement.

20 Cyc. 27.
McFerran vs. Taylor, 3 Cranch 270.
Smith vs. Richards, 13 Peters 26, 38.
Daniel vs. Mitchell, 1 Story 172.
Montreal River Lbr. Co. vs. Mihills, 80 Wis. 540.
Smith on The Law of Frauds, Sec. 49.
Watson vs. Jones, 41 Fla. 241.

4. Where there exists between the parties some relation whereby the purchaser, being ignorant of the facts, is justified in placing trust and confidence in the honesty and superior knowledge of the vendor, or where, in the absence of any particular relation, special confidence is placed in the vendor on account of his peculiar knowledge and the purchaser's igno-

rance, the rule of caveat emptor does not apply, and in such cases the purchaser may without further investigation rely on the vendor's statements even where they might otherwise be deemed expressions of opinion or dealer's talk.

20 Cyc. 60-61.
Watson vs. Molden, 79 Pac. 503, Idaho, 1905.
Nolte vs. Reichelan, 96 Ill. 425.
Pickard vs. McCormick, 11 Mich. 68.
McAiler vs. Horsey, 35 Mich. 439.
Bennett vs. Gibbons, 55 Conn. 450.

5. Where the expression relates to some specific, extrinsic fact, which materially affects the value, and such fact is within the vendor's knowledge; and where the statement is made with knowledge of its falsity or of what the law regards equivalent thereto and the fact is within the superior knowledge of the vendor, such statement amounts to fraud.

Watson vs. Jones, 41 Fla. 241.
Miner vs. Medbury, 6 Wis. 295.
20 Cyc. 59.
Oaks vs. Miller, 11 Colo. App. 374.
Henderson vs. Henshaw, 54 Fed. 320.
Shanks vs. Whitney, 66 Vt. 405.
Whiting vs. Price, 169 Mass. 576.

II.

The complainants herein had no title or right to convey the property.

1. A deed recorded in Miscellaneous Records is no notice to a subsequent purchaser in the absence of actual notice by such subsequent purchaser of the outstanding conveyance.

Richey vs. Griffith, et al., 1 Wash. 429.
Wade on The Law of Notice, 71.

III.

1. Deed: The substitution of the word "Grant," expressed in the deed, for the word "Convey," expressed by the statute, did not prevent said deed from being a substantial compliance with the statute.

Remington & Ballinger's Ann. Code & Stat., Wash. Vol 2, Sec. 8748.

Bargain and sale deeds for the conveyance of land may be substantially in the following form:

The grantor for and in consideration of .....in hand paid, does bargain, sell and convey to..... the following described real estate, situate in the County of ....., State of Washington.

Dated this.....day of ....., 18....

Every deed in substance in the above form shall convey to the grantee, his heirs or other legal rep-

resentatives an estate of inheritance in fee simple, and shall be adjudged an express covenant to the grantee, his heirs or other legal representatives, to-wit: That any grantor was seized of an indefeasible estate in fee simple free from encumbrance done or suffered from the grantor, except the rents and surplusage that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns, may in an action recover for breaches as if such covenant were expressly inserted.

Blood vs. Siebert, 38 Wash. 643.
American Savings Bank & Trust Co. vs. Helgeson, 64 Wash., 54-63.
Williams vs. Hewett, 57 Wash. 62.
West Coast Mfg. & Inv. Co. vs. West Coast Imp. Co., 25 Wash. 627.
Barlow vs. Delaney, 40 Fed. 97.

ARGUMENT.

The position of the appellants in the lower court and on this appeal is that in negotiations pertaining to the sale by complainants to the defendant of said land and timber, James D. Lacey & Company of Portland, Multnomah County, Oregon, acted as the agents and representatives of the complainants, and as a matter of inducement to the

purchase by defendant, R. C. Bell, and to induce said R. C. Bell to purchase the same, ~~and~~ James D. Lacey & Company represented to defendant, R. C. Bell, that there were on said property, as shown by their cruise, exclusive of hemlock, 12 million feet, board measure, of good and merchantable timber, and that defendant, R. C. Bell, accepted said representation as the representation of the owner of the property; believed the same, and purchased the property and executed the promissory note and mortgage in reliance on said representation, and would not have purchased said property nor executed said promissory note and mortgage if such representation had not been made, and if he had not believed the same.

That the representations of the complainants at the time of the sale of the land and timber described in the complaint made by and through their authorized representatives and agents, James D. Lacey & Company, were false and untrue and fraudulent, and known by the said James D. Lacey & Company acting as agents and representatives of the complainants as owners of said property to be false and fraudulent, and that on account of said false and fraudulent representations said R. C. Bell has been damaged.

That the complainants at the time they sold the property to R. C. Bell, which property was later included in the purchase money mortgage which is sought to be foreclosed by this action, nor at any

time, had any right, title or interest in or to the southeast quarter of southeast quarter of Section 24 in Township 10 North, Range 8 West, of Willamette Meridian, described in said mortgage to convey the same and that the conveyance by the plaintiffs to R. C. Bell did not place in R. C. Bell any right, title or interest in and to said timber.

There are certain underlying or obscure principles of law from the true deduction of which was constructed legal maxims which may be stated as independent propositions and which will admit of no modifications. One of these underlying principles of law is that fraud may consist of statements of opinion; reckless statements by a vendor; and may be shown to exist where confidential relations exist between vendor and vendee, or where the vendor has superior knowledge as to the facts represented to the vendee.

Even should the statement of Mr. Langille be taken as a mere expression of opinion, yet that expression of opinion amounted to fraud in that it was so blended with the statement of fact as to become itself a statement of fact. The line of demarcation between statement of existing fact and mere expression of opinion is sometimes very obscure; an expression of opinion being sometimes so closely linked to a statement of the existence of certain facts as to become a part of the latter.

In 20 Cyc. 27 we find the following statement:

> It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge and he makes it recklessly without any knowledge of its truth or falsity and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent.

The rule just stated applies although the speaker honestly believes the fact he represents as existing actually does exist.

Concerning the manner in which a statement of opinion may amount to fraud, we call the attention of the court to the case of McFerrin vs. Taylor reported in 3 Cranch 270, where the court, speaking through Chief Justice Marshall, says:

> He who sells property under description given by himself is bound to make good that description, and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still be liable for that variance.

Again, in the case of Smith vs. Richards, 13 Peters 36-38, the court says:

> The principles of this case (referring to McFerrin vs. Taylor and other cases) we consider founded on sound morals and law. They

rest upon the ground that the party selling property must be presumed to know whether the representations which he makes are true or false. If he knows it to be false, that is fraud of a positive kind, but if he does not know it, then it can only be very gross negligence, and in contemplation of a court of equity representations founded on mistake resulting from such negligence is fraud.

Again, in the case of Daniel vs. Mitchell, 1 Story 172, is stated:

> Nothing is more clear in equity than the doctrine that a bargain founded on a mutual mistake of the facts constituting the very basis or essence of the contract, or founded upon the representations of the seller, material to the bargain and constituting the essence thereof, although made by innocent mistake as well as fraud in any representation of fact material to the contract, furnishes a sufficient ground to set it aside and declare it a nullity.

The position of complainants in the lower court was that the statement of Lacey & Company that the timber would cruise 12 million feet was a mere expression of opinion and did not amount to a positive statement such as would render plaintiffs liable in an action of fraud, but R. C. Bell stated to Mr. Langille that he could not and he would not purchase the property for $30,000.00 unless he were

sure that it would cruise 12 million feet. He made this statement: "If you tell me it will cruise 12 million feet I will give you $30,000.00," clearly indicating that whatever statement would be made by Mr. Langille would be relied upon by Mr. Bell, thus requiring more than a mere expression of opinion, and a positive statement of fact as an answer. Mr. Langille said: "I think it will cruise 12 million feet." He knew that his answer would be relied upon by Mr. Bell, and if it was a mere statement of opinion, it was a statement of a material fact which he knew would be relied upon, and which was wholly relied upon by Mr. Bell, and such statement of an opinion amounted to a misrepresentation in that it was concerning some specific, extrinsic fact which materially affected the value, and in such cases the rule is that if it is peculiarly within the knowledge of the vendor and the statement is made with knowledge of its falsity, or what the law regards as equivalent thereto, and with the intent that the purchaser should act in reliance thereon, which he does to his injury, the representation is actionable. This is the rule laid down in 20 Cyc. 59, whether fraud may consist in passing of an opinion or belief in the guise of positive knowledge, the speaker is not relieved from liability, although in making the assertion he relies upon outside information.

The opinion of Mr. Langille, even though it be termed an opinion, was given in the guise of positive knowledge, as he knew that Mr. Bell would

not buy the property unless it would cruise 12 million feet, and when he stated he thought it would cruise 12 million feet, such statement when proven to be untrue amounted to fraud.

In the case of Howard vs. Gould, 28 Vt. 728, the court says:

> To constitute fraud it is not necessary that a material fact should be directly misrepresented intentionally, but if a false impression is produced by words or acts in order to mislead and obtain an undue advantage, it should be regarded as fraud.

Applying the above principles relative to reckless statements made by the vendor to facts in this case we see that Lacey & Company, according to their own testimony, had made a cruise of the timber on the premises and stated to Mr. Bell, upon his inquiry as to the amount of timber on the premises, that the cruise showed 11,584,000 feet, board measure, of good merchantable timber. The testimony shows that the actual amount of timber upon the premises was 7,916,999 feet. There is such a variance between the statement of Mr. Langille as to the amount of timber on the premises as to show that his statement was either made with the intention to defraud and he knew the same to be false, or was a statement recklessly made without any knowledge as to the actual amount of timber on the premises, either of which constitutes fraud. If

he did not actually cruise the timber himself but relied upon the cruisers of James D. Lacey & Company or upon anyone else, the statement was still fraudulent if untrue, for the weight of authority is that where one relies upon the statements of another and makes a positive statement, which positive statement was made by Mr. Langille, that the timber cruise was 11,584,000 feet, such statement is nevertheless fraudulent on the theory that statements recklessly made are fraudulent.

In the case of Watson vs. Moulden, 79 Pac. 503; 10 Ida.570, where one party stated to another that certain things pertaining to the sale of shares of stock in a Canal Company are true, also facts pertaining to the sale of his interest in certain lands are true, and is informed by the vendee that the said vendee will rely upon statements and purchase shares of stock, wholly relying upon the statements of the vendor and such statements were afterwards found to be false and resulted in inducing the vendee to purchase, the court held that the vendor must respond in damages for his false and fraudulent statements on the ground that a confidential relation existed between the vendor and the vendee concerning the information which was entirely within the knowledge of the vendor.

The court in the above case uses this language:

> By the very well-known weight of authority, ordinary prudence and diligence generally re-

quire a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they could be acted upon, if the facts are peculiarly within the other party's knowledge though they are not exclusively so, and though the party to whom the representations are made may have the oportunity to ascertain the truth for himself.

The court further says:

It is difficult to establish a fixed rule for the governing of cases of this character. It is seldom two cases are found with the same state of facts existing, and the rule seems to be that each case is dependent upon its own particular facts, bearing in mind at all times that the law does not countenance fraudulent statements or misrepresentations made for the purpose of deceiving an intending purchaser; if such facts are shown by the record to exist the courts will refuse to grant him relief for his wrongful acts.

Applying the principle of law laid down in the above case to the case at bar, we find that the statement of R. C. Bell to H. D. Langille, that he would not purchase the property unless it would cruise 12 million feet of lumber, together with the statement of H. D. Langille that he thought it would cruise 12 million feet, shows a confidential relation existing between the complainants and de-

fendants in that James D. Lacey & Company, the agents of defendants and cruisers of timber, had cruised the timber, and the information as to the amount of timber on the property was within their knowledge and theirs alone, and when Mr. Langille, in answer to Mr. Bell's statement, possessing the knowledge as to the amount of timber on the property as he did, made the statement that he thought it would cruise 12 million feet, he made such statement in view of the existence of a confidential relation, and such statement if proven untrue constitutes fraud. Mr. Bell had a right to rely upon the statement of Mr. Langille, as agent of Lacey & Company, for the reason that they were cruisers of good standing in Portland and vicinity and reputed to be very careful cruisers and could be relied upon.

In Pickard vs. McCormick, supra, the court says:

> Where a purchaser, without negligence, has been induced by the arts of a cheating seller to rely upon statements which are knowingly false, and is thereby damaged, it can make no difference in what respect he has been deceived if deceit was material and relied on.

Where, as in this case, the confidential relation was shown to exist, it is the duty of the vendor or the party in whom the confidence is reposed, to be sure that the statement he makes as to the quantity, quality or any other material matter in the transac-

on, is correct, and this is especially true where the endor knows that the vendee relies upon the statement which he has made or is about to make. For here the parties are not yielding on equal terms, s the facts show in the case at bar, for the reason hat James D. Lacey & Company had already ruised the timber, and the seller having superior neans of knowledge gives a false opinion or makes false statement as to material facts for the purose of defrauding the purchaser, and the latter has eason to rely and does rely on its truth, an action ill lie. R. C. Bell was justified in placing trust nd confidence in the honesty and superior knowlge of James D. Lacey & Company, a firm of good anding in the cruising business, especially in view the fact that the ~~confidence~~ shows that the reputation of James D. Lacey & Company was that they ere most conservative cruisers, and in such cases ne purchaser may without further investigation ly on the vendor's statements and this would be specially true of the case at bar in that Mr. Bell ated to Mr. Langille, the agent of James D. Lacey Company, that he relied on the statements made said Langille, and there can be no question but hat this fact was brought home to Mr. Langille in at he testified that he knew Mr. Bell was relying his opinion.

Fraud may be proven where facts are peculiarly ithin the knowledge of the vendor and are misepresented. 20 Cyc 59, where we find the following statement:

> Although statements of the value of property are ordinarily considered as mere expression of opinion and are therefore not actionable, the rule is otherwise where the misrepresentation relates to some specific, extrinsic fact which materially affects the value, and in such cases if the fact is peculiarly within the knowledge of the vendor and the statement is made with knowledge of its falsity or what the law terms the equivalent of falsity, with the intent that the purchaser should act on such statement, and the purchaser does act on such statement to his damage, such conduct amounts to fraud on the ground that the facts stated are within the superior knowledge of the party making the statement.

Now, coming to the question of title. The evidence shows the title to the property above described to be satisfactory with the exception of the southeast quarter of southeast quarter of Section 24. The abstract furnished by the complainant at the time the property was purchased shows a conveyance from Christopher William Whitford and wife to Ernest Strong, purporting to convey the timber upon the said southeast quarter of southeast quarter of Section 24, to said Ernest Strong, which instrument was recorded August 14, 1906, in the office of the County Recorder of Wahkiakum County, Washington, in Book A of Miscellaneous Records. A subsequent conveyance was made by Strong, the grantee in that deed from Whitford and

wife, which subsequent conveyance purported to vest the title of Ernest Strong in Mrs. Morley. Subsequently, however, the grantor in that deed, by a more or less extended series of conveyances, and prior to the date on which Mary E. C. Morley and Fred Morley conveyed to appellant, R. C. Bell, conveyed the land to other parties, some of whom appeared by the form of the conveyance which was subsequently shown, to be residents of New Mexico. The contention of appellant in the lower court and in this court and in the appellate court is that the conveyance from Christopher William Whitford and wife to Ernest Strong, which was recorded in Book A of Miscellaneous Records, was not sufficient to convey the title to the property to Ernest Strong in that it was recorded in the Miscellaneous Records and was no notice, constructive or otherwise, to a subsequent purchaser of the land unless he could show actual knowledge in and of the fact that this instrument which was recorded in Miscellaneous Records was outstanding, and that the Miscellaneous Records are not a part of the legal records of the state and are not recognized by statute or otherwise but are merely a scrap book for the purpose of preserving evidence until actual knowledge could be shown; that therefore the conveyance from Whitford and wife to the parties in New Mexico, subsequent to the date on which they conveyed to Ernest Strong, through which Mrs. Morley derived title, vested the title to the property in the parties in New Mexico irrespective of the prior deed to the purchasers of Mary E. C. Morley,

in that the parties in New Mexico had no notice, constructive or otherwise, of the title being in anyone else than Christopher William Whitford and wife, their grantors.

In the case of Richey vs. Griffith, et al., 1 Wash. 429, we find:

> Under the registry laws of this state the depositing of the deed for record in the office of the County Auditor does not operate as constructive notice to the party. It is necessary that the deed be recorded in the **proper record** and properly indexed, the index being an essential part of the record.

In Wade on Law of Notice, page 71, we find:

> Conveyances not properly recorded are held void as against a subsequent bona fide purchaser or encumbrancer for a valuable consideration whose deed is first filed for record.

The latter principle is a principle of elementary law.

That the conveyance by Christopher William Whitford and wife to the parties in New Mexico, which conveyance was subsequent to the conveyance to Mary E. C. Morley's predecessor, was an assertion of the rights of Whitford and wife in and to the property over the right of the predecessors

of Mrs. Morley to the property in that any subsequent conveyance is an attempt to assert some right in and to the property conveyed. The deed from Mary E. C. Morley and Fred Morley to R. C. Bell was a bargain and sale deed for the conveyance of the property in that it conformed substantially to the statute.

In the case of Blood vs. Siletz, 38 Wash. 643, the complaint alleged that respondent, by his deed of that date, in consideration of $735.00, sold and conveyed to appellant all of the merchantable timber then standing or lying on certain described real estate; that on May 9, 1903, Snohomish Land Company, a corporation, commenced an action in the Superior Court of Snohomish County against appellant and others to quiet title to the property; that afterwards in said action appellant was by order of said court perpetually enjoined from entering said land or from cutting or removing any timber therefrom, and was damaged in the sum of $735.00, for which he asked relief. A general demurrer was imposed which being sustained, appellant refused to plead further. Appellant contended that the deed, being in form a bargain and sale deed, must be held to express the covenants contemplated by Ballinger's Code, Section 4520 (Remington & Ballinger, 8748):

> If said instrument is in law a bargain and sale deed and a substantial compliance with the requirements of said Section 4520, it will

be unnecessary for us to discuss the question whether the interest thereby conveyed was a chattel or such an interest in realty as can be conveyed by deed only. In the absence of any statutory provisions many of the courts of last resort hold that the words "warrant, bargain and sell" when used in the conveyance in fee, do not imply any covenants. It was the evident purpose of the Legislature by the enactment of Section 4520 to provide that the words therein contained, to-wit: "Bargain, sell and convey," should express a covenant that the grantor was seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor, and that the grantee might in an action recover for breaches as if such covenant were expressly inserted.

The court said further:

> The only question then to be considered is whether the substitution of the word "Grant," expressed in the deed, for the word "Convey," expressed by the statute, prevented said deed from being a substantial compliance with the statute.

After quoting definitions from Century Digest and the Encyclopedic Law Dictionary, the court continues:

> From these definitions it will appear that the terms "convey" or "conveyance" and the word "grant" used in instruments intending

> to alienate or transfer realty have substantially the same meaning. We think the use of the word "grant" in the deed instead of the word "convey" was a substantial compliance with the statute. We are warranted in holding that even though we assume the argument of respondent to be correct to the effect that only an interest in real estate was conveyed, yet the deed by operation of law did express a statutory covenant.

We deem the logic of this view controlling in the case at bar. The deed from Mary E. C. Morley and Fred Morley to R. C. Bell was a bargain and sale deed in view of the construction placed upon the statute in the above case; and the fact that the word "grant" was used instead of the word "convey" did not tend to convey the property without implying the covenants which are in a bargain and sale deed, namely, that the grantor was seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor.

In the case of Barlow vs. Delaney, 40 Fed. 97, the court, speaking through Justice Brewer, says:

> The very purpose of the covenant is protection against defects, and to hold that one can be protected only against unknown defects would be to rob the covenant of more than one-half its value, besides destroying the force of its language. If from the force of the covenant

it is desired to eliminate known defects or to limit the covenant in any way, it is easy to say so. General in its language, it reaches all the facts within its terms, known or unknown.

From the foregoing we believe the following principles of law applicable to this case to be deducible.

1. That the statement of James D. Lacey & Company, as agent of Mary E. C. Morley and Fred Morley, that the timber would cruise 12 million feet, was a fraudulent statement of the material fact relied upon by the appellant, R. C. Bell, to his damage.

2. That the conveyance from Christopher William Whitford and wife to the predecessors of Mary E. C. Morley conveyed no title to the predecessors of Mrs. Morley in that it was recorded in Miscellaneous Records which are not recognized as part of the records in the State of Washington, and therefore the subsequent conveyance by Christopher William Whitford and wife, the grantors in the deed to the predecessors of Mrs. Morley, to the parties in New Mexico conveyed the title to said property to the parties in New Mexico.

3. That the deed was a bargain and sale deed containing the covenants implied in a bargain and sale deed.

Respectfully submitted,

KOLLOCK, ZOLLINGER & MCDOWALL.